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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 EDWARD C. BREINER, *et al.*,

11 Plaintiffs,

12 v.

13 NEVADA DEPARTMENT OF
14 CORRECTIONS, *et al.*,

15 Defendants.

Case No. 2:05-CV-01412-KJD-RJJ

ORDER

16 Presently before the Court is Defendants' Motion for Summary Judgment (#30). Plaintiffs
17 filed a response in opposition (#42) to which Defendants replied (#55). Plaintiffs also filed
18 Evidentiary Objections to Defendants' Motion for Summary Judgment (#41). Defendants filed a
19 response in opposition (#56). Having read and considered Plaintiffs' evidentiary objections and good
20 cause lacking, they are denied.

21 **I. Facts**

22 Defendant the Nevada Department of Corrections ("NDOC"), formerly known as the Nevada
23 Department of Prisons, originally selected Corrections Corporation of America ("CCA"), a private
24 contractor, to design, build and operate the Southern Nevada Women's Correctional Facility
25 ("SNWCF"). SNWCF opened in September 1997 housing up to 550 inmates and was certified by
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1 the American Correctional Association in November 1998. Defendant Jackie Crawford became the
2 Director of NDOC in May 2000.

3 After rumors and allegations of inmate and correctional officer misconduct at SNWCF
4 became public in late 2002 and in 2003, Crawford had the NDOC Inspector General, Patrick J.
5 Conmay, investigate. Between August 19 and August 21, 2003, Conmay and several investigators
6 interviewed over two hundred inmates. The results of the investigation were set out in a report dated
7 September 5, 2003. The findings included, but were not limited to, the following:

- 8 1. Frequent instances of inappropriate interaction between male correctional
9 employees and female inmates (including at least one instance of a female
10 inmate becoming pregnant after intercourse with a male correctional
11 employee);
- 12 2. Male correctional employees observed in and out of closets and vacant pods
13 accompanied by female inmates;
- 14 3. Male correctional employees missing from their assigned posts for most of the
15 day without explanation;
- 16 4. An uninhibited sexual environment and nuance involving long-term
17 relationships between female inmates;
- 18 5. An undue number of male correctional employees;
- 19 6. Flirtatious activities between male correctional employees and female inmates;
- 20 7. Intentionally sexually suggestive flirtation by female inmates attempting to
21 compromise male correctional employees in an effort to distract them from
22 security duties while other female inmates engaged in illicit behavior and in an
23 effort to enhance privileges;
- 24 8. Many male correctional employees fell prey to the inappropriate activities;
- 25 9. A lack of supervisory and management oversight and control over male
26 correctional employees;

- 1 10. No evidence of supervisors or managers recognizing the risky behavior or
- 2 taking steps to stop it;
- 3 11. Male correctional employees routinely introduced a variety of contraband,
- 4 such as alcohol, narcotics, cosmetics, jewelry, foodstuffs, and toiletries, as a
- 5 result of being compromised;
- 6 12. Reports of unusual activity are lost or inconsistently acted upon;
- 7 13. A lack of a designated investigative function;
- 8 14. Administrators have failed to successfully identify the problem; and
- 9 15. A widespread knowledge and acceptance of the inappropriate activities.

10 See NDOC Inspector General Investigation Report, p. 4-5, Appendix of Exhibits to Defendants'
11 Motion for Summary Judgment, Vol. 1, Ex. C. Conmy concluded that SNWCF had a leadership
12 void, a management team that could not address serious problems, and an administration slow to
13 identify problems and unsuccessful in obtaining easily located evidence. He recommended, amongst
14 other items, replacing the management team at SNWCF, emphasizing training of line officers with
15 an emphasis on team building and ethical behavior and retraining subordinate correctional employees
16 with an emphasis on female inmate con games and ethical behavior.

17 When pushed to make changes, CCA withdrew from operating SNWCF. Crawford could not
18 locate a qualified private entity to run the position and recommended to the Governor and legislators
19 that NDOC take over operation of SNWCF. Her recommendation was adopted and she began
20 planning to create a management system at SNWCF that would end the systemic problems. Her
21 review determined that many of the correctional employees compromised at SNWCF were male
22 correctional employees in supervisory positions. Crawford was also concerned that male
23 supervisors, including lieutenants, were required to regularly check the female inmate housing units.

24 Crawford also considered training provided in 2004 by the United States Department of
25 Justice, National Institute of Corrections entitled "Working With Women Offenders: Implications for

1 Managers, Supervisors and Employees.” The training focused on using gender responsive strategies
 2 in facilities holding female inmates.

3 One part of Crawford’s plan in restructuring SNWCF was to place three female correctional
 4 officers (Correctional Lieutenants) in supervisory roles in order to reduce the number of male
 5 correctional employees being compromised by female inmates. Another part of the plan aimed to
 6 utilize a 70 percent female to 30 percent male ratio for subordinate correctional employee positions.
 7 The three Correctional Lieutenants would be hired through selective certification. Crawford believed
 8 that this process had been approved by the Nevada Department of Personnel (“NDOP”) when it
 9 issued State of Nevada Job Announcement No. 530344. See State of Nevada Job Announcement
 10 No. 530344, Appendix of Exhibits to Defendants’ Motion for Summary Judgment, Vol. 1, Ex. F.

11 The announcement was posted online at the NDOP website and bulletin boards at NDOC
 12 correctional facilities. Qualifications required that the applicant be female, have a minimum of one
 13 year work experience as a Correctional Sergeant in the State of Nevada or possess an equivalent
 14 combination of education and experience. In addition to other requirements, candidates would also
 15 have to pass an oral examination. Two of the three positions were filled on an emergency basis
 16 pursuant to Nevada statute. NDOC assumed operation of SNWCF in October 2004.

17 The job announcement closed October 18, 2004. A total of twenty (20) applicants, male and
 18 female, applied for the positions.¹ An NDOP recruiter determined that twelve (12) of the twenty (20)
 19 applicants were qualified. Ten (10) of the twelve (12) applicants passed the oral examination.
 20 Eventually, three female applicants, including one of the two who had been hired on an emergency
 21 basis, were selected for the positions.

22 Plaintiff Randy Stout attempted to block the hiring of the women through the NDOC’s
 23 grievance process. All Plaintiffs filed charges of discrimination with the Nevada Equal Rights
 24 Commission and the Equal Employment Opportunity Commission. In response, Crawford again
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26 ¹None of the Plaintiffs in this case applied for the positions.

1 sought permission for the female only appointments from the NDOP Director, Jeanne Green, before
 2 making the appointments official. Crawford received permission on January 28, 2005.

3 From May 1, 2000 to September 6, 2005, twenty-nine (29) out of thirty-seven (37)
 4 correctional employees hired as Correctional Lieutenants were male. Only three (3) of thirty-one
 5 (31) Correctional Lieutenant promotions from 2003 to 2005 were specified as female only. The ratio
 6 of subordinate correctional employees at SNWCF as of February 22, 2005 was 64.5 % female to
 7 35.5% male. Defendant Glen Whorton was the Director of NDOC from September 2005 until
 8 February 2007.

9 II. Standard for Summary Judgment

10 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
 11 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
 12 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
 13 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
 14 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
 15 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
 16 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
 17 587 (1986); Fed. R. Civ. P. 56(e).

18 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
 19 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
 20 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
 21 or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial.
 22 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
 23 issues of controversy in favor of the non-moving party where the facts specifically averred by that
 24 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497
 25 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 345
 26 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine

1 issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on “mere
 2 speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th
 3 Cir. 1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine
 4 issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d
 5 1054, 1061 (9th Cir. 2002).

6 Summary judgment shall be entered “against a party who fails to make a showing sufficient
 7 to establish the existence of an element essential to that party’s case, and on which that party will
 8 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
 9 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

10 III. Analysis

11 Plaintiffs’ only remaining claim for relief is based upon gender discrimination in violation of
 12 Title VII of the Civil Rights Act of 1964. Under Title VII, it is “...unlawful...for an employer...to fail
 13 or refuse to hire or to discharge any individual, or otherwise discriminate against an individual with
 14 respect to his compensation, terms, conditions, or privileges of employment because of such
 15 individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Here,
 16 Defendants concede that a facially discriminatory plan was adopted by the NDOC and therefore this
 17 case “turn[s] on whether such overt disparate treatment is for some reason justified under Title VII.”
 18 Everson v. Mich. Dep’t of Corrs., 391 F.3d 737, 747 (6th Cir. 2004)(quoting Reed v. County of
 19 Casey, 184 F.3d 597, 599 (6th Cir. 1999)). Title VII permits overt discrimination if the disparate
 20 treatment is a *de minimis* restriction or where it is based on a bona fide occupation qualification, or
 21 BFOQ. See Robino v. Iranon, 145 F.3d 1109, 1110 (9th Cir. 1998); Everson, 391 F.3d at 747.

22 Furthermore, the professional judgment of prison administrators is entitled to deference. See
 23 Robino, 145 F.3d at 1110. Prison administrators must be allowed to “adopt innovative solutions to
 24 the intractable problems of prison administration.” Turner v. Safely, 482 U.S. 78, 89 (1987)(in
 25 Eighth Amendment cases); see also Torres v. Wisconsin Dep’t of Health and Social Servs., 859 F.2d
 26 1523, 1532 (7th Cir. 1988)(though the judgment of prison administrators not entitled to as much

1 deference in Title VII cases as constitutional cases, “their judgments still are entitled to substantial
 2 weight when they are the product of a reasoned decision-making process, based on available
 3 information and experience.”). The court should not “substitute completely its own judgment for that
 4 of the administration.” Id.

5 A. *De Minimus* Restriction

6 Defendants assert that because only three out of thirty-one Correctional Lieutenant
 7 promotions from 2003 to 2005 were specified as female only and because twenty-nine out of thirty-
 8 seven Correctional Lieutenants hired were male from May 1, 2000 to September 6, 2005 that
 9 restricting the three Correctional Lieutenant positions at SNWCF had a *de minimus* effect upon
 10 Plaintiffs’ opportunities for promotion. Plaintiffs entirely failed to respond to Defendants’ argument
 11 that the restriction had a *de minimus* effect.

12 The policy limits eligibility for such a small number of positions – three out of thirty-one
 13 promotions from 2003 to 2005 – that it imposes such a *de minimus* restriction on male correctional
 14 officer’s opportunities that it is unnecessary to decide whether gender is a BFOQ for the three
 15 Correctional Lieutenants positions at SNWCF. See Robino, 145 F.3d at 1110; Tharp v. Iowa Dep’t
 16 of Corrs., 68 F.3d 223, 226 (8th Cir. 1995)(en banc), *cert. denied* 517 U.S. 1135 (1996)(exclusion of
 17 male officers from female-only shifts constituted such a “minimal intrusion” on their employment
 18 that the court need not reach the BFOQ issue to uphold the policy).

19 B. BFOQ Analysis

20 However, assuming *arguendo* that Plaintiffs raise a colorable Title VII claim, the Court
 21 concludes that gender constitutes a BFOQ for the three Correctional Lieutenant posts at SNWCF at
 22 issue here. The record supports the claimed BFOQ and Defendants have done little, if anything, to
 23 raise an issue of fact.² The undisputed record is clear that the NDOC adopted the policy limiting

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 25 ²For example, Plaintiffs designated Plaintiff Randy Stout as their expert witness. However,
 26 in order to establish proper corrections policy, using the testimony of an employee recently promoted
 to Correctional Lieutenant to counter that of two former Directors of the NDOC whose decisions are
 entitled to substantial deference does not establish an issue of fact.

1 Correctional Lieutenant positions at SNWCF to women based on concerns for security, and inmate
2 safety, privacy and rehabilitation. Clearly the motivating factors were the results of the investigation
3 conducted by NDOC Inspector General Patrick J. Conmay which concluded that male correctional
4 employees were being compromised by female inmates at an alarming rate. Though Defendants try
5 to focus solely on female-on-female conduct of the inmates and the fact that the female inmates were
6 aggressive in attempting to compromise male correctional employees, the investigation was clear in
7 identifying that the problems were caused by an overabundance of male correctional employees who
8 were willing to be compromised and the lack of or ineffective oversight of those employees by male
9 supervisors. The professional judgment of NDOC officials in determining that restricting the
10 Correctional Lieutenants' positions to female applicants only is entitled to deference, because it was
11 the product of a reasoned decision-making process based on available information and experience.
12 See Robino, 145 F.3d at 1110.

13 Courts have offered various formulations of the BFOQ defense. See Dothard v. Rawlinson,
14 433 U.S. 321, 333 (1977); Everson, 391 F.3d at 748. “[I]t is impermissible under Title VII to refuse
15 to hire an individual woman or man on the basis of stereotyped characterizations of the sexes[.]”
16 Dothard, 433 U.S. at 333, 335. Where discrimination is on the basis of gender, the employer bears
17 the burden of proving:

- 18 1) that the job qualification or function justifying the discrimination is reasonably
19 necessary to the essence of the defendant's particular business; and
- 20 2) that gender is a legitimate proxy for the qualification or function because:
 - 21 (a) there is a substantial basis for believing that all or nearly all employees of
22 the affected gender lack the qualification or ability to perform that function, or
 - 23 (b) it is impossible or highly impractical for the defendant to insure by
24 individual testing that its employees will have the necessary qualifications for
25 the job.

1 See E.E.O.C. v. Boeing Co., 843 F.2d 1213, 1214 (9th Cir. 1988); Harriss v. Pan American World
 2 Airways, Inc., 649 F.2d 670 (9th Cir. 1980).

3 A defendant prison must “demonstrate why it cannot reasonably rearrange job responsibilities
 4 within the prison in order to minimize the clash between privacy interests of the inmates and the
 5 safety of the prison employees on the one hand and the non-discrimination requirement of Title VII
 6 on the other[,]” before the prison will be entitled to the BFOQ exception. United States v. Gregory,
 7 818 F.2d 1114, 1118 (4th Cir. 1987) citing Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079
 8 (8th Cir. 1980); see Jordan v. Gardner, 986 F.2d 1521, 1527 (9th Cir. 1993) (citing Gunther with
 9 approval, but also noting that it was overruled on other grounds, by Kremer v. Chemical Constr.
 10 Corp., 456 U.S. 461 (1982)).

11 In this case, giving substantial deference to the NDOC officials, it is clear that Defendants
 12 have met their burden in establishing the BFOQ defense. The NDOC's goal of reversing the very
 13 real and documented problems at SNWCF by providing more privacy for the female inmates and a
 14 better environment for rehabilitation and improving safety and security at the prison by reducing the
 15 number of compromised male correctional officers justify the designated gender-based Correctional
 16 Lieutenant positions. See Everson, 391 F.3d at 750 (citing Reed v. County of Casey, 184 F.3d 597,
 17 600 (6th Cir. 1999); Robino, 145 F.3d at 1110-11; Tharp, 68 F.3d at 226; Torres, 859 F.2d at 1532)).
 18 Much like the situation in Everson, the “poisoned atmosphere” at SNWCF that bred misconduct on
 19 the part of both inmates and correctional officers demonstrates that gender is reasonably necessary to
 20 the essence of NDOC's “business” of housing female inmates in a secure environment that is safe for
 21 both inmate and employee and provides the best environment for rehabilitation of the female inmate.
 22 See id. at 753.

23 Furthermore, gender is a legitimate proxy because, as demonstrated by the problems at
 24 SNWCF, some male officers possess a trait precluding safe and efficient job performance – a
 25 proclivity for sexually abusive conduct – that cannot be ascertained by means other than knowledge
 26 of the officer's gender. See id. at 755; Robino, 145 F.3d at 1110-11. Finally, the NDOC's legitimate

1 penological interests outweigh whatever interest male correctional officers may have in applying for
2 the three Correctional Lieutenant's positions at the SNWCF. Viewing the evidence in a light most
3 favorable to Plaintiffs, Defendants have met their burden of demonstrating that their policy is
4 reasonably necessary to the operation of SNWCF. Defendants have established these three
5 Correctional Lieutenants' positions are a reasonable response to the concerns about inmate privacy,
6 abuse by male correctional officers and the rehabilitation efforts of the facility. Accordingly, the
7 Court grants Defendants' motion for summary judgment.

8 C. EEOC's Reasonable Cause Determination

9 Plaintiffs have argued that the EEOC's reasonable cause determination in this case, alone,
10 requires the Court to find that a genuine issue of material fact exists for trial. However, while such a
11 determination is highly probative, conclusory determinations which do not disclose which facts the
12 EEOC considered and how it analyzed them have little probative value. See Coleman v. Quaker Oats
13 Co., 232 F.3d 1271, 1283-84 (9th Cir. 2000). Here, the EEOC letter rests its determination on vague
14 references to the evidence without disclosing which evidence, other than the listing of the open
15 positions as female only, it relied upon in making its determination. Accordingly, the letter is too
16 vague to be of probative value.

17 D. Request to Deny the Motion Pursuant to Rule 56(f)

18 Plaintiffs also argue that the motion should be denied because a pending motion to compel
19 and for sanctions regarding discovery would result in discoverable evidence essential to Plaintiffs'
20 action. However, Magistrate Judge Robert J. Johnston has since denied Plaintiffs' motions.
21 Furthermore, Defendants did not object to Judge Johnston's orders and they have become final. See
22 28 U.S.C. § 636(b)(1)(A); Local Rule IB 3-1. Accordingly, Plaintiffs' request to deny the motion for
23 summary judgment pursuant to Rule 56 (f) is denied.

24 IV. Conclusion

25 IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (#30) is
26 **GRANTED**;

1 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants
2 and against Plaintiffs.

3 DATED this 9th day of February 2009.

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7 Kent J. Dawson
8 United States District Judge
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